

**SUPERIOR COURT OF CALIFORNIA**

**County of San Diego**

**DATE: April 3, 2006**

**DEPT. 71**

**REPORTER:**

**CSR#:**

**HON. RONALD S. PRAGER,  
JUDGE PRESIDING**

**REPORTER'S ADDRESS:**

**P. O. Box 128**

**San Diego, CA 92112-4104**

**CLERK: K. Sandoval**

**BAILIFF:**

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Judicial Council  
Coordination Proceedings  
No. JCCP 4041

Coordination Proceeding  
Title [Rule 1550(b)]  
TOBACCO CASE

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**TENTATIVE RULING- CA's DEMURRER:**

The Demurrer filed on behalf of the People of the State of California ex rel. Bill Lockyer, Attorney General of California (hereinafter "CA") to the Amended Cross-Complaint filed by U.S. Smokeless Tobacco Company (hereinafter "US Smokeless") is hereby SUSTAINED with leave to amend.

Preliminarily, the Court grants CA's Request for Judicial Notice, which is unopposed, relative to the pleadings attached thereto and to the extent that it seeks judicial notice of the existence of other documents attached as Exhibits 1-3.

CA's demurrer to US Smokeless' First Cause of Action for Breach of Section VII(c)(6) and Consent Decree Section VI.A is hereby sustained with leave to amend. Although US Smokeless' allegations may be sufficient to allege the existence of certain obligations on the part of CA pursuant to Section VII(c)(6) of the STMSA and Section VI.A of the Consent Decree (to "seek to resolve an alleged violation...by discussion pursuant to XV(n)...[and to] "give good-faith consideration to whether the Participating Manufacturer that is claimed to have violated this Agreement has taken appropriate and reasonable steps to cause the claimed violations to be cured..."), US Smokeless' failed to properly allege CA's breach of those obligations. US Smokeless admits that CA "provided counsel for USSTC with a 'courtesy copy' of a 30-day notice" and that "California...initially agreed to hold the 30-day notice in abeyance pending discussions among the parties to this action..." and that discussions did, indeed, take place. [See Amended Cross-Complaint, ¶¶65-66, 68, 72.] In addition to being unclear as to exactly what obligations were allegedly breached by CA, US Smokeless' first cause of action

failed to properly allege its performance under the STMSA or resulting damages, both of which are required to properly state a breach of contract cause of action. Relative to its performance, US Smokeless merely alleges that it “worked diligently to comply with its obligations under the STMSA.” [¶9.] Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against CA for breach of its obligations under Section VII(c)(6) of the STMSA and Section VI.A. of the Consent Decree, if possible. US Smokeless should clearly allege what obligation(s) therein were allegedly breached by CA, US Smokeless’ performance under the STMSA and Consent Decree, and damages.

CA’s demurrer to US Smokeless’ Second Cause of Action for Breach of STMSA Sections VII(c)(6) and XV(n) and Consent Decree Section VI.A is sustained with leave to amend. It is unclear from US Smokeless’ allegations what obligation(s) under those sections were allegedly breached by CA. US Smokeless merely alleges in paragraph 89: “California has violated *as alleged above* the duty under the STMSA and Consent Decree regarding the designation of senior representatives to discuss disputes by representing that it had authority from other Settling States to discuss dispute resolution and to assess the meaning of the terms of the STMSA when it in fact did not or, in the alternative, by soliciting, inducing, and/or accepting such an improper delegation of authority, and/or failing to provide appropriate notice of such delegation as required by section XV(n) of the STMSA.” Section VII(c)(6) references “discussion pursuant to Section XV(n) and Section XV(n) requires that provide proper notice of its designation of a senior representative. In addition, US Smokeless again fails to properly allege its performance and damages. Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against CA for breach of its obligations under Sections VII(c)(6) and XV(n) of the STMSA and Section VI.A. of the Consent Decree, if possible. US Smokeless should clearly allege what obligation(s) therein were allegedly breached by CA, US Smokeless’ performance under the STMSA and Consent Decree, and damages.

CA’s demurrer to US Smokeless’ Third Cause of Action for Breach of STMSA Sections VII(f) and VIII(a) is hereby SUSTAINED with leave to amend. US Smokeless has not and cannot properly state a claim for breach of Section VII(f) as it is inapposite. Section VII(f) states in pertinent part: “The Attorneys General of the Settling States (through NAAG) shall monitor potential conflicting interpretations by courts of different States of this Agreement and the Consent Decree.” US Smokeless has not alleged any potential conflicting interpretations by courts of different States, and this Court is only aware of the underlying action relative to US Smokeless’ alleged violation of the STMSA. As to Section VIII(a) which specifically addresses NAAG’s obligations, US Smokeless does not properly allege breach of any obligations contained therein by CA. US Smokeless’ conclusory allegation that “California and NAAG have violated as alleged above their duty under the STMSA to coordinate, facilitate, and implement the STMSA and cooperate with USSTC” is inadequate despite US Smokeless’ allegation that NAAG was “acting as the agent or delegatee of California and other Settling States.” [Amended

Cross-Complaint, ¶16.] Although US Smokeless' allegations may be sufficient to allege the existence of certain obligations on the part of CA pursuant to Section VIII(a) of the STMSA, US Smokeless' failed to properly allege CA's breach of those obligations. Again, US Smokeless also failed to properly allege performance and damages. Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against CA for breach of its obligations under Section VIII(a) of the STMSA, if possible. US Smokeless should clearly allege what obligation(s) therein were allegedly breached by CA, US Smokeless' performance under the STMSA, and damages.

Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against CA for breach of its obligations under Section VIII(a) of the STMSA, if possible.

CA's demurrer to the Fourth Cause of Action for Breach of the STMSA Section XV(m) is hereby sustained with leave to amend. Section XV(m) obligates CA to "use its best efforts and to cooperate...to cause this Agreement to become effective, to obtain all necessary approvals, consents, and authorizations, if any and to execute all documents and to take such other action as may be appropriate in connection herewith." US Smokeless does not allege that CA failed to obtain any necessary approvals, consents or authorizations or that it failed to execute any documents, and the STMSA has already become effective. Section XV(m) also obligates CA to "support the integrity and enforcement of the terms of this Agreement and the Consent Decrees." In light of the fact that the Court has granted US Smokeless leave to amend to state causes of action against CA for breach of the STMSA, US Smokeless can possibly properly allege that CA violated this obligation under Section XV(n). However, US Smokeless again failed to properly allege its performance under the STMSA and damages. Leave to amend is liberally granted, and US Smokeless is hereby granted leave to properly state a cause of action against CA for breach of its obligations under Section XV(n) of the STMSA, if possible.

In addition, US Smokeless argues in its opposition that it has stated claims for various declarations [see Opposition, 3:13-9:15.] US Smokeless can pursue multiple theories of liability, and the question of US Smokeless' ability to prove their allegations, or possible difficulties in making such proof is of no concern in ruling on a demurrer [*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214], and US Smokeless may also attempt to state separate causes of action for Declaratory Relief, if possible.

In light of the fact that the Court has granted US Smokeless leave to amend to state a proper breach of contract cause of action against NAAG, if possible, NAAG's demurrer to the fifth cause of action for breach of the covenant of good faith and fair dealing, which is a derivative cause of action, is also hereby SUSTAINED with leave to amend.

The Court notes, however, that "... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." [*Racine & Laramine, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4<sup>th</sup> 1026, 1032, 1032.]

US Smokeless is hereby granted twenty (20) days to file a Second Amended Cross-Complaint in accordance with this ruling.

IT IS SO ORDERED.